MOTION OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Elliot Institute for Social Sciences Research (hereinafter "Elliot Institute") hereby moves pursuant to Supreme Court Rule 37.2 for leave to file an *amicus curiae* brief in support of Respondents, Robert P. Casey, et.al.. Consent for filing this brief was denied by the Respondent, on April 2, on the basis of a disagreement with the analysis of Elliot Institute justifying regulation of abortion as a birth control technology. This is a secondary issue touched upon in this brief and should not deter the Court from receiving the facts and analysis contained herein which relate directly to the issues of informed consent and waiting periods.

The Elliot Institute seeks to provide the Court with valuable information pertaining to the issue of informed consent for women seeking abortions. The Elliot

Institute is in a unique position to present first hand evidence of abortion patients' dissatisfaction with pre-abortion counseling at Planned Parenthood clinics, specifically, and at other abortion providers, as well.

David C. Reardon, director of research for the Elliot Institute, is the author of *Aborted Women, Silent No More*, a comprehensive reference book on the aftereffects of abortion which has been cited in several briefs filed before this Court in this case and in several other previous abortion cases. This work includes a major study of 253 women who sought counseling for post-abortion related problems an average of 10 years after their abortions. This was the first major study of the long term aftereffects of abortion and included patient evaluation of abortion services and counseling.

Specifically, this study revealed a high

rate of dissatisfaction with pre-abortion counseling on the part of the post-abortion women surveyed. Claims by physicians and counselors that counseling is adequate must be weighed against the views of patients who report that in retrospect the counseling was incomplete, biased, and even manipulative.

Elliot Institute research establishing a statistical link between inadequate pre-abortion counseling and increased severity of post-abortion reactions has been accepted for publication in a leading peer review journal of family and adolescent psychology.

Elliot Institute is not aware that these findings have heretofore been fully presented, or presented in any respect, to this Court, or the lower courts, in this case. A finding that those receiving counseling are in polar disagreement with abortion providers as to the quality of

that counseling is clearly relevant to this case and should be the basis for granting of this Motion.

Because the chief investigator for this research is associated with the Elliot Institute, the Elliot Institute is the most authoritative source for interpreting and explaining to the Court these research results which have a direct bearing on the issues of informed consent and waiting periods.

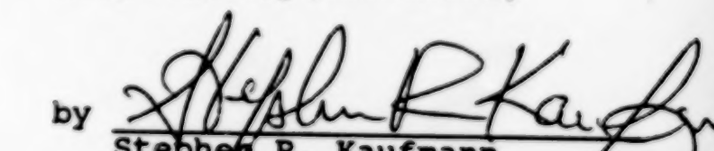
The research associates of the Elliot Institute are leaders in the investigation and documentation of the psychological aftereffects of abortion on women. The Elliot Institute has collected over 1500 case studies of women who have suffered psychological aftereffects of abortion. To Elliot Institute's knowledge, this is the largest case study collection of this type. The Elliot Institute has also published major reviews of the literature in this

field, and has published the results of two major surveys of post-abortion women.

Present research projects include a controlled, longterm study of the aftereffects of abortion using a random population of women. This is the largest such study ever done, with over 800 randomly selected participants.

The Elliot Institute, having demonstrated considerable expertise in the area of post-abortion trauma, and specifically in the area of informed consent as it relates to such trauma, respectfully requests the Court to accept this *amicus curiae* brief as an aid in its deliberations.

Respectfully submitted,

by 

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-744 and 91-902

Planned Parenthood of Southeastern Pennsylvania, Reproductive Health and Counseling Center, Women's Health Services, Inc. Women's Suburban Clinic, Allentown Women's Center, and Thomas Allen, M.D., on behalf of himself and others similarly situated,

Petitioners and Cross Respondents,

v.

Robert P. Casey, Allan S. Noonan, and Ernest D. Preate, Jr., personally and in their official capacities,

Respondents and Cross-Petitioners.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH

INTERESTS OF AMICUS

The Elliot Institute for Social Sciences Research favors holding the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982, statute, 18 Pa. Cons. Stat. Ann. §§3201-3220 constitutional in their entirety. Having performed and published extensive sociological research which demonstrates that women seeking abortion are often denied information which they would desire concerning the risks of abortion, *Amicus* believes that the State has a compelling interest to regulate abortion providers who often exploit women and minors who are at high-risk of suffering abortion related complications. *Amicus Curiae* supports State regulations which protect women from unwanted abortions and which preserves their natural rights to reproductive freedom.

SUMMARY OF ARGUMENT

Recent studies by Elliot Institute

researchers have found that nearly 85% of women who suffer post-abortion problems report that they were denied relevant information or were misinformed during pre-abortion counseling.[1] Statistical analysis of these women demonstrates a strong link between inadequate pre-abortion counseling and increased severity of subsequent psychological problems.[2]

Even research conducted by abortion advocates has also found that the majority of women seeking abortion have little or no prior knowledge about the abortion procedure, its risks, or fetal development.[3] For most women, the counseling they receive at the clinic, is the only information they

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[1]Reardon *Aborted Women - Silent No More*, (1987), 22. (Hereinafter Reardon). A copy is lodged with this brief.

[2]Franz and Reardon, "Different Effects of Elective Termination of Pregnancy On Adolescents and Adults," *1990 Annual Report*, West Virginia University, 40-43.

[3]Zimmerman, *Passage Through Abortion*,139 (1977) (hereinafter Zimmerman).

will receive about abortion and alternatives. If a counselor introduces bias, the results can be tragic.

Amicus will show that accurate counseling about the risks of post-abortion trauma, which may have a delayed onset of ten years or more, is not normally provided to abortion patients. Yet it is an undeniable fact that abortion involves both physical and psychological health risks. When abortion providers withhold potentially "stressful" information about abortion and its risks, they are paternalistically denying women the right to knowledgeably evaluate the risks of abortion against its perceived benefits. Pre-abortion counseling is biased by many factors and is clearly inadequate.

In an elective abortion, where the woman, not the physician, is held responsible for the wisdom of her decision, the practice of withholding potentially

stressful information cannot be justified.

The State has a right to judge the "significance" of health risks associated with any product or service and to regulate or prohibit trades or practices accordingly. This right includes the right to regulate reproductive technologies such as abortion.

Abortion, itself, is not a fundamental right, but rather an "evolved" right. In *Roe v Wade*, 410 U.S. 113, 163 (1973) this right was described as evolving from advances in medical technology by which the mortality rate of abortion may now be less than the maternal deathrate of childbirth. By extension of this reasoning, as technological changes reveal new dangers associated with abortion, the State's "compelling" interests in regulating abortion may increase or decrease proportionately. Thus, even within the framework of *Roe*, and with respect to *stare*

decisis, the statute in question stands.

Recent medical research has shown that there are far more health risks associated with abortion than were known at the time of *Roe*. Therefore, since abortion involves significant risks even in the first trimester, the State has a compelling interest in regulating abortion throughout pregnancy.

The fundamental issue before this Court is to identify the proper balance between the rights of individuals and the State. *Amicus* will argue that the State has a compelling right to regulate all birth control technologies, including abortion. At the same time, *Amicus* will argue that the State's right to regulate these technologies, is properly limited by the *inherent* and *natural* right of individuals to conceive and bear children.

Such a balance of natural reproductive rights versus regulation of technology can

and should be enunciated, especially now when individual rights are being threatened as never before. In the place of the present confusion surrounding "privacy" rights, *Amicus* offers the Court a clear rationale and timeless standard for protecting both the "natural reproductive rights" of individuals and the right of State to regulate technologies and commerce.

ARGUMENT

I. BIASES IN THE ABORTION INDUSTRY MAKE SELF-REGULATION OF INFORMED CONSENT IMPOSSIBLE.

A. PLANNED PARENTHOOD AFFILIATES, AND OTHERS IN THE ABORTION INDUSTRY, HAVE A RECORD OF WITHHOLDING INFORMATION ABOUT RISKS OF WHICH REASONABLE PATIENTS WOULD WANT TO BE INFORMED.

The Reardon Study found that 95% of

post-aborted women who received counseling or abortions at a Planned Parenthood facility report that they received little or no information about fetal development; over 80% said they received little or no information about the potential risks of abortion; and 64% report that when they asked questions, their questions were not thoroughly answered, or their concerns were trivialized. Nearly 85% of the women surveyed believe that they were misinformed or denied relevant information or during their counseling. Only 13% felt adequately prepared for the abortion and forewarned of risks after receiving counseling at a Planned Parenthood facility. Those who received counseling at facilities other than Planned Parenthood report even lower levels of satisfaction. [Reardon, 19] In retrospect, over 90 percent of women who suffer post-abortion trauma complain that they did not receive enough information at

the clinics on which to base an informed choice. [Reardon, 16-18]

Statistical analysis demonstrates that patient dissatisfaction with abortion counseling is a highly significant predictor ($p<.0001$) of severe psychological reactions after an abortion.[4]

The scope of this problem is just now being understood. In 1990, psychologist Catherine Barnard found that at three to five years post-abortion, 18.8% of aborted women had developed "diagnosable post-traumatic stress disorder (PTSD)" a psychological dysfunction which can severely limit a person's ability to engage in normal relationships and work. Approximately half had many, but not all, symptoms of PTSD.[5]

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[4]Franz and Reardon, 43.

[5]Barnard, "The Long-Term Psychological Effects of Abortion," (Portsmouth, N.H.: Institute for Abortion Recovery and Research, 1990).

B. PLANNED PARENTHOOD, AND OTHER ABORTION PROVIDERS, HAVE A PHILOSOPHICAL BIAS TOWARD ENCOURAGING CLIENTS TO CHOOSE ABORTION OVER CHILDBIRTH.

According to the Reardon Study, only 25% of the post-aborted women surveyed who were counseled at Planned Parenthood affiliates described themselves as already firm in their decision to have an abortion at the time they went in for counseling. Over 60% were still looking for *another* option to abortion. Fully 93% said it was possible that they would have chosen differently if they had not been so strongly encouraged to abort by others, including their abortion counselor. When asked "Did the clinic, doctor, or counselor help you to explore your decision?" fully 85% of Planned Parenthood clients replied "not at all," and an additional 13% answered "very little." In retrospect, 72% percent said their counselors advice was very "biased"

toward choosing abortion. [Reardon, 18-19]

When a woman is experiencing such ambivalence, counselors have an inordinate influence over their decisions. When faced with clients who express a desire to keep their child, abortion counselor Betty Orr says: "I ask them who is going to take care of the baby while they're in school. Where are they going to get money for clothes?"[6] Other counselors bluntly tell the woman to forget the motherhood fantasy and "get realistic." Raising a child, they are told, costs hundreds of thousands of dollars. Faced with such antagonism, from parents, boyfriends, and their "health-care" advisors, is it any wonder that young women cave in to the unrelenting pressures to abort even when 60% or more would actually prefer to keep their babies?[7]

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[6] Francke, *The Ambivalence of Abortion*, 179

[7] Zimmerman, 139, also Reardon, 16-18.

Pressured into "choosing" abortion by Planned Parenthood counselors at the age of 13, Kathy Walker charges: "I felt like my family had no control over anything. My parents felt as deceived as I was; we never really made an informed decision. Planned Parenthood railroaded us...But nobody ever really asked me what I wanted to do."[8]

In another case, an Indiana Planned Parenthood affiliate ignored the warnings of Kathleen Kitchen's own physician who believed an abortion could be fatal because she suffered from certain birth defects. Evading two court orders blocking the abortion, counselors procured a dangerous out-of-state abortion for the girl which resulted in hospitalization for abortion related complications.[9] These events

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[8] Kupelian, "Abortion, Inc." *New Dimensions*, (October 1991) 14.

[9] Bond, "Mother Files $1 Million Lawsuit," National Right to Life News, October 23, 1986, p6.

demonstrate that a pro-abortion bias may overcome even the most basic evaluation of abortion's dangers for high risk patients.

Part of abortion counselors' bias is financially motivated. Some see themselves in the "business" of selling abortions.[10] Some act paternalistically, honestly believing that abortion is the best solution to every problem pregnancy.[11] Others have openly expressed misogynist and racist attitudes, defending abortion as a means of eliminating the poor. These persons provide abortions as a means to prevent these "unfit" persons from raising "unfit" children.[12]

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[10] Zeckman and Warrick, "Abortion Profiteers," Special Reprint, *Chicago Sun-Times*, 1978

[11] Reardon, 251-243.

[12] Dr. Edward Allred, owner of the largest chain of abortion clinics in California is a staunch advocate of abortion as a method of controlling the population of minority groups: "Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem

Perhaps the widest spread bias is an ideological commitment to population control. The primary purpose of the Planned Parenthood Federation of America, for example, is to serve as a population control advocate. Any health care services it provides are subservient to that goal.[13]

According to the PPFA's organizational documents, population control, "is a most essential step, if not the most essential step ... to solve the most critical problems of hunger, deprivation and the hopelessness of poverty, as well as

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that tide; I'd set up a clinic in Mexico for free if I could.... When a sullen black woman can decide to have a baby and get welfare and food stamps and become a burden to all of us it's time to stop." "Doctor's Abortion Business Is Lucrative", *San Diego Union*, Oct. 12,, 1980 B1:1.

[13] Ample documentation of this can be found in the following: J. Kasun, *The War Against Population: The Economics and Ideology of Population Control*, (1988) (hereinafter Kasun); A. Chase, *The Legacy of Malthus: The Social Costs of the New Scientific Racism* (1977) (hereinafter Chase), J. Simon, *The Ultimate Resource* (1981) (hereinafter Simon); G. Greer, *Sex and Destiny* (1984) (hereinafter Greer).

deterioration of our water, land and air."[14] Other PPFA documents declare that population control is also crucial for bringing about world peace.

In their view, population control is a virtual panacea. It is so important that the PPFA officials have frequently supported the right of governments to force abortion on women who become pregnant without government consent.[15] Even though

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[14] Schwartz, "Bringing the Sexual Revolution Home: Planned Parenthood's 'Five-Year Plan'", America 138:6, 18 February 1978, 114-116.

[15] Planned Parenthood has frequently supported coercive population control. For example, at the White House Conference on Hunger in 1969, Dr. Alan Guttmacher of Planned Parenthood supported a national plan of (1) mandatory abortion for any unmarried girl found pregnant within the first three months of pregnancy, and (2) mandatory sterilization of any such girl giving birth out of wedlock for a second time. (E. Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", *Abortion and Social Justice*, eds. Hilgers, 235 (1972).)

Similarly, Frederick Jaffe, Vice President of the Planned Parenthood/World Population and head of research for Alan Guttmacher, has argued for government population programs which would require "permits for children", "compulsory sterilization of all who have two children", "compulsory abortion", "encourage homosexuality", and "fertility control agents in water supply." (*Family Planning Perspectives*, Special supplement-U.S. Population Growth and Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24.)

Planned Parenthood president Faye Whattleton has likewise promoted an us-against-them, rich-versus-poor mentality as motivation for population control at any price. (Simon, 327)

they have lost U.S. funding because of this stance, PPFA's international affiliates continue to provide assistance to the Chinese government's program in which unlawfully pregnant women are "handcuffed, tied with ropes, or placed in pig's baskets" while awaiting their forced abortions.[Kasun, 91]

Other examples of abortion proponents who support coercive population control, including forced abortion, are numerous. For example, Lawrence Lader, founder of the National Abortion Rights Coalition, and author of the pro-abortion tract *Abortion* (1966) which was cited as an authority eight times in *Roe v. Wade*, is also a radical proponent of coercive population control, arguing that forced population

control is "imperative," both at home and abroad, since "We must accept the principle that having a child is no longer a matter of private will, but of public welfare."[16] In a review of the Chinese program of forced population control which includes forced abortion, forced sterilization, forced contraceptive implants, and infanticide of handicapped newborns, and infanticide of undesirable female offspring, Lader has only the highest praise.[17]

Similarly, former N.O.W. president Molly Yard has defended the Chinese anti-choice policy, saying: "I consider the Chinese governments policy among the most intelligent in the world."[18]

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[16] Lader, *Abortion II: Making the Revolution*, (1973) 218-222.

[17] Lawrence Lader, "The China Solution," *Science Digest*, 91:4, April 1983, 78.

[18] Transcript of "Oprah Winfrey Show," July 6,

Persons or organizations who advocate coercion, privately or publicly, would certainly not hesitate to conceal or understate the risks of abortion. Indeed, such population control zealots have frequently defended the use of dangerous or insufficiently tested birth control technologies on the grounds that injured women are a "secondary" concern compared to "overpopulation."[19]

1989.

[19] In 1970, Planned Parenthood President, Dr. Alan Guttmacher testified before a Senate subcommittee that the health dangers of the Pill are secondary to the social "dangers" of pregnancy and overpopulation. ("Expert Decries 'Alarm' on Birth Control Pill," *New York Times*, Feb. 26, 1970, 50:3)

As another example, at a 1962 conference sponsored by the Population Council, the IUD was being promoted as the panacea for controlling the world's "overpopulation." Arguing that the risks of IUD use were acceptable, Dr. J. Robert Willson, of the University of Michigan School of Medicine defended its wide-spread promotion saying: "If we look at this from an overall, long-range view, perhaps the individual patient is expendable in the general scheme of things, particularly if the infection she acquires is sterilizing but not lethal." (Mendelsohn, *Male Practice: How Doctors Manipulate Women*, 120)

Similarly, Dr. Ravenholt, head of AID's population control programs, defended the widespread promotion of Depo-Provera, despite initial negative results, on grounds that the ill-effects could not be fully

Since PPFA's organizational mandate is to reduce birth rates, here and abroad, especially among the poor, its "family planning" services are merely a means to that "all-important" end. Their counseling services are therefore biased by this perspective.

If a few women, or even 80%, suffer minor to severe post-abortion trauma, population controllers may deem this a small price to pay for world peace, prosperity, and environmental purity. Abortion is an essential tool for population control, and they will continue to promote it even if it means hiding the risks from pregnant women.[20]

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ascertained until tested on tens of millions of women. (Ehrenreich, et.al., "The Charge: Genocide," *Mother Jones*, November 1979, 30)

[20] While the sincerity of population controllers beliefs is not questioned here, it is noteworthy that the myth of overpopulation has been thoroughly debunked. Indeed, the overwhelming benefits of population growth are only now becoming fully appreciated. (See the exhaustive works of Simon, Kasun, Chase.) Notably, even population controllers admit that the evidence against their theories of overpopulation problems is impossible to refute, but they insist that their approach of forced population control is still a safer bet. (Hardin, "The Tragedy of the Commons," *Science*, December, 1968, 1243-1248) Hardin, incidentally, claims to have been the first to develop the rhetoric of a "woman's right to control her own body," yet in practice he too supports coercive population control programs, especially of "feeble-minded" groups, because "Injustice is preferable to total ruin." *Ibid.*

II. ABORTION PATIENTS HAVE A GREATER NEED FOR A FULL DISCLOSURE OF RISKS THAN OTHER PATIENTS, AND THEREFORE "THERAPEUTIC PRIVILEGE," THE RIGHT TO WITHHOLD DISTURBING FACTS, DOES NOT APPLY.

As described above, the abortion industry is plagued with a widespread population control fanaticism, paternalistic and racist attitudes, and simple greed. These attitudes produce a manipulative brand of counseling which promotes abortion and denigrates the option of childbirth.[21]

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[21] The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. For a

Whenever any bias, about any medical procedure, exists, it tends to produce a bias in favor of underdisclosure of risks, thereby making a "community medical standard" for disclosure inadequate.[22] "As the patient must bear the expense, pain and suffering of any injury from medical treatment, his right to know all material facts pertaining to the proposed treatment cannot be dependent upon the self-imposed standards of the medical profession."[23]

Even when a treatment is life-saving, the option of withholding potentially upsetting information from patients, "therapeutic privilege," is very narrow. This option is narrowed even further in the

review of the literature see Reardon, 232-271.

[22] Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 Wis. L. Rev. 124.

[23] *Cooper v. Roberts*, 220 Pa. Super Ct. 260,267,286 A.2d 647, 650 (1971). See also *Wilkinson v. Vesey*, 110 R.I. 606,624,295 A.2d 676,687 (1972);

case of an *elective* procedure such as abortion.[24]

Since a decision against an *elective* abortion is, by definition, never life-threatening, the withholding of "upsetting" information is never justified. A decision to forego a previously desired elective abortion because of possible risks, even remote ones, is always reasonable. When physicians or counselors withhold information because they fear the information will lead to an "unreasonable" choice for childbirth, they are reflecting their own bias into the decision making process, a bias that has no medical basis.

This is especially true since the majority of abortion patients are ambivalent about their choice in the first place, and 84% say they have kept the pregnancy

[24] Annas, *The Rights of Hospital Patients: The Basic ACLU Guide to a Hospital Patient's Rights*, 68.

under better circumstances.[25] Because this decision to abort is often tentative, or even resisted, "upsetting" information may be *exactly* what a woman is looking for as an excuse to keep her child when everyone else is pressing her into an unwanted abortion.

It is often far easier for a reluctant woman to tell her pressuring boyfriend, or parents, that "The doctor says abortion is dangerous," than "I want this baby, even if you don't." When everyone around her is insisting that abortion "is the best solution" and will be "safe and easy," it is hard to resist this pressure without appearing "irrational." Displaying fear about even modest risks, may be her only lifeline for escaping an unwanted abortion.

A. SINCE "BASIC RESPONSIBILITY" FOR THE

[25] Reardon, 11-20. Zimmerman, 110-112,143.

ABORTION DECISION HAS BEEN SHIFTED TO PATIENTS, THERE IS NO RATIONAL GROUNDS FOR WITHHOLDING ANY INFORMATION, EVEN THE MOST DISTURBING.

In *Roe*, the Court held that "basic responsibility for it [the abortion decision] must rest with the physician." (at 166) In practice, however, the mere fact that a woman wants an abortion is viewed by abortionists as sufficient reason to provide one; it is the woman is who is expected to bear responsibility for the wisdom of her decision, not the physician.

When abortion providers shift "basic responsibility" for the abortion decision to the patient, it becomes even more important that the patient receive *all* available information about the risks of the procedure, options, and fetal development. *Amicus* would argue that in the absence of a close physician-patient relationship, the option of withholding

potentially upsetting information for an elective abortion disappears completely.

If the burden of evaluating her health needs is to be shifted entirely to the patient, than *all* available information should be given to the patient. Since the patient's initial decision to have an abortion is often made out of desperation, or even coercion from her family and friends, a thorough education about risks, options, and fetal development is clearly necessary in order to rationally and reasonably evaluate that decision in light of its possible negative effects on her future reproductive, psychological, and social health.

B. LACK OF FULL DISCLOSURE INCREASES THE INCIDENCE OF POST-ABORTION TRAUMA AND INCREASES THE SEVERITY OF THE TRAUMA.

Post-abortion women who suffer physical or psychological complications about which

they were not warned, or who later learn of fetal development from another source, suffer delayed trauma and have increased feelings of having been exploited.[26] Increased levels of psychological trauma have been measured among women who perceive that they received poor or inadequate counseling, among women who feel they rushed through their decision, and among those who claim their decision was not "well thought out."[27] Additional information, and waiting periods, provide an essential safeguard for many women.

Coercion and moral ambivalence are 2 of the 14 identified criteria which determine whether or not a woman is at high risk of

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[26] Reardon, 115-142. Dr. Vincent Rue, a clinical psychologist with an extensive practice in post-abortion counseling reports: "I have seen hundreds of patients in my office who have had abortion who were just lied to by the abortion counselor. Namely: 'This is less painful than having a tooth removed. It is not a baby.' Afterwards, the woman sees *Life* magazine [cover of a developing fetus] and she breaks down and goes into a major depression." Kupelian, 16.

[27] Franz and Reardon, 43.

suffering long-term mental health problems as a result of her abortion.[28] Over half of post-aborted women report feeling "forced" to have abortion by others.[29]

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[28] These 13 high risk characteristics are: 1) ambivalence about the decision; 2) pressure in the decision; 3) a prior abortion; 4) prior children; 5) adolescence; 6) religious or conservative values; 7) a desire to keep the abortion secret; 8) lack of partner's support; 9) lack of parents' support; 10) prior emotional or psychiatric problems; 11) prior low self-image; 12) abortion of planned child due to fetal abnormalities; 13) second or third trimester abortion; 14) a history of sexual assault, especially if the pregnancy is the result of sexual assault. Rue, Institute for Abortion Recovery and Research, "Pro-Abortion Counseling for Post-Aborted Women: The Implications" 1991 paper session of the Association for Interdisciplinary Research; Senay, "Therapeutic Abortion: Clinical Aspects", 23 *Archives of Gen. Psych.*, 408-415; Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic Abortion", *Am. J. Psychiatry*, v.131, 1332-1337 (1974); (1970); Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester Abortion", 4 *J. of Psychosomatic Ob&Gyn*, 141-150 (1985); Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy",*The Lancet*, v.1, 635-638 (1970); Reardon, 131-38.

[29] Between 30 and 60 percent of women having abortions have a positive desire to carry the pregnancy to term and keep their babies. [Zimmerman,110-12,120; Reardon, 12,51] This desire to keep the child is overcome only by external pressures. In a study of over 250 women who had suffered physical or psychological aftereffects from abortion, 54 percent felt "forced" into an unwanted abortion by others and 64 percent felt "forced" by their circumstances. Only 33 percent felt free to make their own decision, and 61 percent felt their lives and decisions at that time were very much "controlled by others." [Reardon, 10-11] Pro-choice researchers have similarly found that over two-thirds of the women made statements suggesting they had "no

Nearly 70 percent of women seeking abortions have a negative moral view of abortion.[30] Clearly, the majority of women having abortion have one or more characteristics of high risk patients.

For high risk patients the resulting post-abortion trauma can literally destroy a woman's self-image, resulting in: drug and alcohol abuse, suicidal behavior, emotional numbness, emotional breakdown, radical personality changes, memory loss, sleep disorders, sexual dysfunction, increased tendency toward violence, child abuse, difficulty bonding with later children, psychosomatic illnesses, and more.[31]

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choice" or were "forced" to have an abortion. [Zimmerman, 193]

[30] Zimmerman, 69; Reardon, 13

[31] Strahan, *Major Articles and Books Concerning the Detrimental Effects of Abortion: An Annotated Bibliography*, contains the most extensive collection of findings published in the journals of medicine and psychology. See also, Saltenberger, *Every Woman Has the Right to Know the Dangers of Legal Abortion*, and Reardon, 115-142. A summary of a detailed survey of

Sixty to eighty percent of all women having illegal abortions can be classified as high-risk aborters who choose abortion only to please others, or because they feel at a loss for other options.[32] For these women, abortion is at best a marginal choice. At worst, it is a choice which is literally forced upon them.

Very few of these women would freely choose abortion in the presence of emotional, social, or financial support. Many would have chosen differently, if given adequate information about the risks of abortion, fetal development, or alternatives. Provision of this information to significant others, including family, husbands, and boyfriends,

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100 high-risk abortion patients, entitled "Post-Abortion Reactions of High Risk Abortion Patients," undertaken by Reardon for the Elliot Institute has also been lodged with this brief.

[32] Reardon, 131-134,297-300.

would also reduce the pressure on these women to undergo unwanted, and potentially dangerous abortions.

VI. THE STATE MUST HAVE AN UNLIMITED RIGHT TO REGULATE ABORTION, AT ANY STAGE OF PREGNANCY, FOR A BROAD RANGE OF HEALTH REASONS.

A. *ROE* DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH."

The abortion right enumerated in *Roe* rests entirely on the much disputed "fact" that advances in medical technology make "abortion in early pregnancy...relatively safe"(at 149) and that today "mortality in abortion may be less than mortality in normal childbirth." (at 163).

But how can a "fundamental" human right

come into existence only *when* abortion appears to be safer than childbirth? If it is a fundamental right, then it is a right which exists regardless of its dangers. By what power can any *fundamental* right be expanded or contracted merely by changes in medical technology?

The answer is that abortion is not a fundamental right. Rather, it is an *evolved right* which rests upon advances in medical science.

Because it was dealing with an evolved right, the *Roe* majority erred in thinking that the medical "facts" which it found to be compelling in 1973 would not change with the acquisition of new knowledge and new technologies. If at one moment in history the State's "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life" (*Roe* at 115, 149) can contract, then at another point in history they can expand.

If, for example, new technologies make unsuspected risks more apparent, the State's rights may expand. Similarly, knowledge of fetal development, new theories of "meaningful life," and advances in fetal medicine and artificial wombs may also change the States "compelling" interests over time.[33]

Recognition of this fact that abortion is at best an "evolved right," would allow States great latitude in regulating abortion in accordance to new findings of fact, while at the same time respecting the doctrine of *stare decisis*.

Additional evidence that access to abortion technology is not a fundamental right is seen in the fact that *Roe* assigns

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[33] In its eagerness to grant physicians the right to perform "safe" abortions, which many States were already recognizing, the Roe majority's fundamental error was in granting itself the authority to restrict and define those interests which the State could find to be "compelling." If the State is not free to be guided by its own judgment of what is compelling, then the State is not free at all.

responsibility and control over abortion primarily to the attending physician. (at 163 and 166) But if the consultation and consent of a single physician can be required in the making of this health decision, why not the consultation and consent of parents, or a panel of physicians, or a State agency? Parents, husbands, physicians, and the State all have legitimate and compelling interests in safeguarding the health of women.

A husband, for example, deserves, at the very least, notification of an abortion not only to enable him to safeguard his child, but also his wife. If physical or psychological aftereffects occur, the husband must be in a knowledgeable position to help his wife in seeking treatment. Ironically, while petitioners maintain that husbands may brutalize their wives if notified of a pending abortion, the evidence suggests that abusing husbands are more likely to

brutalize wives who *refuse* to abort a pregnancy which *he* does not want.[34]

This interest of outside parties is especially valid when the stress of an unplanned pregnancy may cause a young woman to make a rash and ill-informed decision which may have severe negative effects on her life. This interest is further increased when a woman is vulnerable to being pressured into an unwanted abortion.

B. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR WERE OTHERWISE IGNORED IN *ROE V. WADE*.

While *Roe* considered only the mortality rate of abortion in its determination that abortion is "safe," new evidence suggests that there are unforeseen psychological and

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[34] Reardon, 31,78,210. Over 50% of women who suffer post-abortion trauma report being pressured into the abortion by boyfriends or husbands. Reardon, 11.

reproductive complications resulting from abortion.[35]

Abortion's defenders do not deny its risks so much as downplay them, arguing that this or that risk is "negligible." But such evaluations are clearly value judgments. If the State can be concerned about unintended deaths from abortion, why not subsequent miscarriages or ectopic pregnancies? Who is to decide what the "acceptable" limits of abortion induced depression, guilt, suicide, or child abuse are to be?

Given the uncertainty surrounding the impact of all technologies, the State's compelling interests may change with time. The State must be free to regulate any technology, including abortion, in accordance with such new information.

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[35] See Strahan for approximately 750 citations relevant to aftereffects of abortion which have been studied since 1973. See also Reardon, Franz, Zimmerman, Pare, Lazarus, and Saltenberger.

Since abortion has health risks, even during the first trimester, the State may find in these risks a compelling interest to protect women from these risks throughout pregnancy.[36] Given the State's two-fold interest in protecting the health of women, and protecting the life of human embryos, there is can be no absolute right to use abortion technologies.

V. THE STATES HAVE A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES, SUCH AS ABORTION, WHICH SHOULD NOT BE RESTRICTED.

Abortion should not be any more exempt from State regulation than any other birth

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[36] The State's right to regulate this technology is especially important since there is no guarantee that women considering abortions will be adequately and accurately informed of the health risks or will be in the proper emotional state to rationally weigh these risks. The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. See Zeckman. For a review of the literature see Reardon, 232-271.

control technology. If anything, it should be subject to even greater regulation, given the State's legitimate interest in the inter-uterine human life, or "potential person." But even if this secondary interest is ignored, the State should be free to regulate abortion for reasons of health and morals, just as it is allowed to regulate other birth control technologies.

A. THE RIGHT OF THE STATE TO REGULATE BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW.

In *Griswold v. Connecticut* 381 U.S. 479 (1964), at 485 and 507, the Court recognized that the State could regulate the manufacture, sale, and distribution of contraceptives in the same way that it is empowered to regulate any other trade or commerce.[37]

[37] In his dissent in *Poe v. Ullman*, 367 U.S. 497 (1960), which anticipated his majority opinion in *Griswold*, Justice Douglas recognizes that States would have a right to ban completely the sale of contraceptives through drug stores, or even ban the manufacture of contraceptives because: "Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States. The present law, however, deals not with sale, not with manufacture, but with *use*." (at 519).

As emphasized in *Griswold*, the failure of the Connecticut law was not that its goals, or even that its means were illegitimate, but rather that its means were incongruous with other laws. To allow the manufacture and distribution of contraceptives, but to ban their "use" is unreasonable. Such means "sweep unnecessarily broadly" in the absence of less intrusive controls over manufacture and sale. (at 485)

Similarly, in *Eisenstadt v Baird*, 405 U.S. 438 (1971) (White concurring, at 463), the plurality continued to recognize that contraceptives may be regulated for the purposes of protecting health, or even

promoting morals. (at 448, 450, and White concurring at 463) But the Court struck down the Massachusetts law because it was "so riddled with exception" (at 449) that the legislature's true intent was apparently not the protection of health or morals, but rather the limitation of "contraception in and of itself." (at 443)

Specifically, the Court questioned the sincerity of the claim that the regulations were based on moral grounds because the State allowed for the "exception" of unregulated distribution of condoms.(at 448,449) But this "exception" existed because the State chose to classify condoms as being primarily a prophylactic with a secondary effect as a contraceptive. For logical reasons the State therefore chose to regulate prophylactics differently than other contraceptives, even though the prophylactic could also be used for a contraceptive purpose.

Given the present AIDS crisis, the State's preferential treatment of condoms now appears entirely reasonable. In hindsight, the *Eisenstadt* decision dismantled an important public health policy by which the State limited access of non-prophylactic birth control technologies to a group at high risk of transmitting venereal disease (unmarried persons) so as to compel this group to either abstain from sexual intercourse or use prophylactic birth control devices.

In addition, the *Eisenstadt* majority concluded that the contraceptives regulated by the State had no health risks, and so could not be regulated for health reasons. (at 451, White concurring, 464) But spermicidal agents, the contraceptive at issue in *Eisenstadt*, are *now* known to carry the risk of causing serious fetal malformation, miscarriage, genital irritation, and

infection.[38] Since the health effects of any technology can remain undetected for many years, it is clearly imprudent for the Court to ever classify any technology as "safe" merely on the evidence available at one point in time. Determination of when a contraceptive has been sufficiently proven to be "risk-free" is properly left to the State.

Furthermore, spermicides, like many other contraceptive devices, have a high failure rate in preventing conception. Therefore, State regulation of those who distribute and counsel others in the use of birth control technologies is clearly reasonable when the State's "health" interests are broadly construed to include concern for unplanned pregnancies. And

[38] Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). In *Wells v Ortho Pharmaceutical Co.*, 615 F.Supp. 262 (N.D. Ga. 1985), plaintiffs were awarded $5.6 million in compensatory damages for birth defects resulting from spermicide use.

since pregnancies resulting from contraceptive failures pose a greater "potential danger" for unmarried persons, because they are less prepared to raise a child in a stable home, the State should be able to regulate the distribution of potentially faulty birth control devices to this group for which contraceptive failures pose the greatest health risk.

If one takes a broad view of the State's health concerns, it is clear that the State should enjoy latitude in regulating birth control technologies, including abortion.

B. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS.

Birth control technologies have a great number of health, moral, and public policy implications. These costs and benefits must be weighed and adjusted with the needs of the time. For example, during a time of

a great venereal disease threat such as AIDS, it is conceivable that the State may seek to promote prophylactic contraceptives and discourage other methods. At other times, the State may wish to ban contraceptives which are less effective and result in a higher incidence of unplanned pregnancies. At still other times, the State may ban technologies for which there are safer alternatives.[39]

At most times, the State is likely to attempt to balance these competing concerns of health, morals, and effectiveness. Such laws, while a sincere attempt to protect and serve the people, will be imperfect because the technology is imperfect.

Judicial intervention in the regulation of birth control technologies threatens the

[39] Such was the case when the FDA forced the removal of "sequential pills" from the market because, according to current data, combination pills are more effective and have fewer risks. FDA Consumer 25 (April 1976).

ability of the States to respond to changing moral and public health needs. In the cases of *Eisenstadt* and *Roe*, the Court forced changes upon the States which the legislatures were already freely considering in the light of individual and public health needs. Let the State legislate, and eventually it may get it right on its own.

C. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS NECESSARY BECAUSE PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS ARE SOMETIMES MOTIVATED TO PROMOTE BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE.

The birth control and abortion industries in America encompass a multi-billion dollar market. Drug manufacturers, physicians, and family planning agencies all enjoy a share in these profits, and all of these parties have a financial interest

in these technologies.

Part of this promotion includes defending their technologies from charges of being unsafe. The controversies surrounding the health risks of abortion, the IUD, and the Pill, for example, have gone on for decades and are still unresolved.

Thus, while evidence exists to defend or condemn any birth control method, those who sell these products will tend to believe and promote the evidence which supports their interests. It is the proper role of the State to consider evidence both for and against a birth control method, and to regulate these methods according to its own assessment of effectiveness, risks, and social costs. At times the State's decision ~~may~~ be manipulated by the "facts" of one party or another, but this risk is no greater than the risk that the judiciary will be deceived.

State regulation of birth control

technologies is also justified because many physicians, family planning agencies and drug manufacturers are ideologically bound to reducing births among some classes of women regardless of the detrimental side-effects which their technologies will impose on women. Evidence of this population control bias was offered earlier in this brief.

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED.

While *Amicus* asks the Court to explicitly affirm the State's right to regulate birth control technologies, such as abortion, *Amicus* also recognizes a need to clarify and strengthen the legitimate and inherent reproductive rights of all persons.

As noted above, population controllers pose a real threat to reproductive freedom. The State in turn may also pose such a threat. Federally funded family planning programs have periodically come under attack from recipients who felt coerced into "voluntary" sterilizations or "elective" abortions.[40] American policy has similarly encouraged coercive population control programs in numerous other Third World nations as a precondition to foreign aid.[41]

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[40] "[T]here is uncontroverted evidence in the record that...poor people have been improperly coerced into accepting sterilization..." U.S. District Court of D.C., Judge Gesell, *Relf V. Weinberger*, civil actions Nos. 73-1557,74-243, March 1974.) See also Craven, 263; Reardon 272-278; and Chase, 16-19. In a study of four Indian Health Service hospitals between 1973 and 1976, the GAO found that 3406 sterilizations were performed without the patient's informed consent as a result of a general policy to restrict population growth of Indians. Miller, "Native American Peoples on Trail of Tears Once More," *America*, 9 December 1978, 423.

[41] Kasun,79-94. For example, in 1976 the U.S. government pressured India into forcibly sterilizing three million people in mobile tent-camps. [Kasun, 85-86] At approximately the same time, Dr. Ravenholt, director of AID's Office of Population insisted that one-quarter of the fertile women of the world must be sterilized to meet U.S. goals of population control and to maintain "the normal operation of U.S. commercial interests around the world." [ibid, 81]

In *Buck v. Bell*, 274 U.S. 200,207 (1927) the Court explicitly allowed the State to force sterilization on any person considered a "potential parent of socially inadequate offspring" because it is "better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[42]

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[42] Two years prior to *Buck v. Bell*, an unknown European foreshadowed Holmes' decision claiming that the unfit were sapping the strength of the State, and in order regulate their births, "the State will have to avail itself of modern medical discoveries. It must proclaim as unfit for procreation all those who are afflicted...and practical measures must be adopted to have such people rendered sterile." The book calling for control of reproduction as a cornerstone of social policy was *Mein Kampf*, by Adolf Hitler. [Chase,135]

By 1932, American sterilization programs had forcibly sterilized 15,000 persons. German health officials, in turn, structured German eugenic programs on the American model. Ludmerer, *Genetics and American Society* 118 (1972); Drogin, *Margaret Sanger*, 24 (1980). When the Germans surpassed America's population control efforts, Paul Popenoe of the American Birth Control League (later renamed Planned Parenthood), praised the Germans for

True reproductive freedom does not exist under the present interpretation of Constitutional rights. If under *Bell* the State has the right to prevent the reproduction of undesirable persons, then surely this would encompass the right to implement forced abortions, or forced contraceptive implants.

A. THE VAGUELY DEFINED "RIGHT TO PRIVACY" MUST BE REPLACED BY A MORE CAREFULLY DEFINED "NATURAL REPRODUCTIVE RIGHTS."

Amicus argues that the first step which must be taken toward restoring reproductive freedom is the abandonment of the umbrella "right of privacy." It must be recognized that when the Court first began to articulate this "right," it burdened itself

"proceeding toward a policy that will accord with the best thought of eugenicists in all civilized countries." Ludmerer, 117.

with vague terminology which by its very nature can be either totally meaningless or irresistibly powerful.[43]

Envisioned as arising from the shadowy penumbra of the Constitution, this "right" lacks clear guiding principles or even a common understanding which can serve to protect the people, guide the judiciary, or justly restrict the legislatures. Thus, if only for the sake of clarity, this catch-all "right of privacy" must be replaced with a more precisely defined term.

Amicus argues that in the place of the "right of privacy" the Court should recognize the "natural reproductive right" of individuals. This more narrowly defined right addresses the issues raised by the

[43] The right of privacy presently guiding judicial decision is an undefinable enigma; it "cannot be said to be absolute" [Roe, 154] yet it is a "fundamental" right which repeatedly prevails over State interests. Does the "right of privacy" include only sexual behavior? Birth control access? Reproductive freedom? All private behaviors? Semi-private behaviors?

contraception and abortion cases, and draws a clear line between the rights of individuals and the privileges of the State.

With seventy years of legal confusion surrounding issues related to reproductive freedom, such a clarification of the law is urgently and immediately needed from the Court. A logical and timeless framework for defining the "natural reproductive rights" of persons is described in the remainder of this brief.

B. THE NATURAL RIGHT OF REPRODUCTIVE FREEDOM, AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS, IS THAT RIGHT WHICH ARISES FROM A PERSON'S NATURAL REPRODUCTIVE BIOLOGY, IN RESPECT OF WHICH: 1) THE STATE MAY NOT LIMIT ANY PERSON'S NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR

COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN.

Whether or not one believes the Declaration of Independence's claim that the inalienable rights of all persons are endowed upon them by their Creator, the natural reproductive rights of all people are clearly central to our biological humanity. Any law which transgresses these inherent rights for the sake of any social goal, whether to eliminate the "unfit" or to "create a race of thoroughbreds" through eugenic manipulations, violates all human dignity and freedom.

History demonstrates that the more totalitarian a State becomes, the more likely it is to seek to control every aspect of life, even human reproduction, so as to control both the "quality" and quantity of its population. Accordingly, no just government has the right to coerce

or force sterilization, contraception, or abortion upon any person or group of persons. Recognition of this right must begin with a rejection of *Buck v. Bell*.

Amicus would further argue that the right to natural fertility includes the right to enter into a heterosexual marriage for the purpose of establishing a family.

But while the right to intercourse within marriage is an inalienable corollary to the natural right of reproduction, sexual activity outside of the marital covenant is not similarly included. The distinction lies in the fact that extramarital intercourse is rarely intended as an exercise of reproductive freedom, but instead is an exercise of sexual self-gratification. Furthermore, the State has had a long standing, and well recognized interest in safeguarding and promoting the special nature of marital relations and protecting the stability of the family unit. Sexual

activity outside of marriage such as fornication, adultery, homosexuality, incest, statutory rape, and bestiality have never been recognized as natural rights, and the State should retain the power to legislate against such activities. Such non-reproductive, extra-marital activities are contrary to nature, destructive of the family, exploitive of persons, diminish human dignity, and risk begetting children into unstable families.

On the other hand, the State's right to *discourage* sexual activity outside of marriage must still be limited to the extent that it may not forcibly limit the natural fertility of persons engaged in extra-marital activities. Furthermore, the children of illicit unions should be accorded the same rights and status of all other persons since by their conception, their parents entered into a *de facto* marriage covenant, though perhaps a bigamous one, which in-

vokes mutual responsibilities and duties toward their children and each other.

Natural reproductive freedom was alluded to by the Court in *Eisenstadt v. Baird*, at 453, in its statement regarding the right to self determination with regard to an individual's "decision whether to bear or beget a child."

While *Amicus* agrees with the core principle of individual reproductive rights which underlies this statement, the conclusions reached in *Eisenstadt* are overly broad. For while every individual has the right to control his or her natural reproductive powers, this right does not include the right to use any means or technology a person wants to control the bearing and begetting of children.

While the State must be prohibited from infringing on natural reproductive rights, the State does have a legitimate right to regulate and even proscribe birth control

technologies which can be used to limit fertility, enhance fertility, or artificially create new human, or non-human, life. Since all technologies have social and economic consequences, health consequences, moral consequences, and very frequently, unforeseen consequences, and are subject to abuse, nearly all technologies have at one time or another been subject to liability claims in the courts and regulation by duly empowered governments.[44]

With regard to birth control technologies, a term which includes artificial conception and gestation technologies as well as contraceptive and abortifacient technologies, the consequences of these technologies are becoming increasingly complex.

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[44] The only types of technology which might have some claim to Constitutional protection are technologies related to the right to bear arms. But even this technology cannot be given an absolute status. Individuals are not entitled to own any conceivable weapon, but rather are entitled to "reasonable" access to firearms.

For example, the issues of surrogate mothers, custody of frozen human embryos, *in vitro* fertilization, and visitation rights of sperm donors, are even now perplexing both the judiciary and the legislature. In the future, such issues as genetic engineering, artificial wombs, animal wombs, cloning for replacement organs, and a whole host of other technologies will arise which will dwarf the present quagmire. Surely the State has a legitimate interest in regulating present as well as future birth control technologies.

There is no Constitutional basis for distinguishing between birth control technologies and any other technology. Therefore, the Court cannot and should not treat birth control technologies as a "favored technology" and impose restraints on the right of States to regulate this class of technologies.

To limit the right of States to regulate

technology on the basis of a shadowy "right of privacy" which is dimly perceived within the Constitution and hazily-defined within this Court's rulings, is a short-sighted course which will surely lead to ever more confusion in the decades ahead. Perhaps worse, such a limitation on the States will serve as an invitation to technocrats to exploit men and women with ill-conceived and dangerous technologies which will wreak havoc on individuals and society.

C. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO MAKE REPRODUCTIVE DECISIONS.

While the State has a right to regulate birth control technologies, it is obvious that the State has no interest or desire to enact a general prohibition of birth control technologies. Indeed, quite to the contrary, federal, state, and local govern-

ments have been spending hundreds of millions of dollars promoting contraceptive use. Given the overwhelming public and government support for increasing contraceptive use, there is no realistic basis in the allegations of abortion proponents that allowing the States to regulate reproductive technologies would lead to a ban against all birth control. Even if some States were to choose to regulate some birth control technologies for reasons of health or morals, it is evident that such regulation would be accompanied by the promotion of better, substitute methods.

Furthermore, even the abstract possibility that the State might one day seek to "force" population growth by a ban on contraceptives poses no threat to reproductive freedom. The history of population growth, around the world, shows that even without access to contraceptive technology or abortion, peoples of all eras and

nationalities have limited their births according to their needs through the employment of delayed marriage, withdrawal, periodic or total abstinence, or even with the unreliable rhythm method.[45]

These natural methods of fertility regulation have been surpassed in the last twenty years by the discovery of at least six new methods of natural family planning, each with many variations, which employ from one to seven body symptoms for identifying the exact time of female fertility. The most commonly recommended methods have method effectiveness ratings for avoiding pregnancy of from 97-99 percent, rates which are at least comparable to the Pill, and easily exceed the effectiveness rates of IUDs, condoms, jellies and the rest.[46]

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[45] See authorities Greer, Kasun and Simon

[46] The final report of a 1978 federal study of NFP, found a 100 percent method effectiveness rate for a Sympto-Thermal variation of NFP and a 94% effectiveness rate for the Ovulation Method. The

These natural methods of fertility control, both the old and the new, employ no technology, only self-knowledge. The dissemination of such knowledge would be protected by First Amendment rights. Therefore, it is unreasonable to believe that even an oppressive government's ban against all birth control technologies could ever "force" people into conceiving "unwanted" children.

The existence of natural methods of birth control demonstrates that individuals will always have reasonable alternatives to birth control technologies and a reasonable opportunity to exercise their reproductive freedom. The State is not obligated to guarantee any more than these natural opportunities, though in its sovereignty it

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highest tested effectiveness rate ever reported belongs to a variation of the Temperature-Only method which has been demonstrated to have only 7 unplanned pregnancies per 10,000 fertile woman-years, a rate which is less than half the failure rate for vasectomy. J. Kippley, *The Art of Natural Family Planning*, 14-17 (1984).

is certainly free to provide technological aids if it so chooses.

In some ways, natural reproductive rights are similar to the right of free speech. Ultimately, the inalienable right to free speech is guaranteed by the natural abilities of humans to communicate. But while the right of free speech is enhanced by mass communication technologies, not all persons have equal access to these technologies, nor is the State required to provide access to these technologies. Clearly, while speech is a natural right which the State may not infringe upon, technological enhancements of this right are open to regulation.

The Court's only constitutional obligation, in this matter, is to protect the natural right of reproduction which is inherent in every person's biology. Beyond that, the people, acting through their elected representatives, must be free to

regulate the technologies they desire to enhance their natural rights. Left alone, the laws passed by properly elected legislatures will eventually come to reflect the "compelling" interests of the people.

Such laws regulating birth control technologies cannot, by definition, oppress the inherent rights of individuals. All inherent rights are natural to and arise from the God-given dignity of every human person. The right to free speech, the right to assembly, the right to travel, the right to defend oneself from aggression, these are inherent, natural rights obvious from the nature of social persons with hands, feet, mouths, and minds. Technologies, on the other hand, have no rights.

CONCLUSION

In summary of the above arguments, *Amicus* respectfully petitions the Court to: (1) reject the "right of privacy" as

unconstitutionally vague; (2) recognize the "natural right of reproductive freedom" as a fundamental and inalienable right of all human beings; (3) recognize the State's right to regulate birth control technologies, including abortion, for any broadly defined health reasons considered significant by the State; and (4) hold that the amended 18 Pa. Cons. Stat. Ann. §§3201-3220 is a constitutional regulation of a birth control technology which does not infringe on the "natural rights of reproductive freedom."

It is clear that the confusion created by the poorly defined "right to privacy" has led to the conflict at hand. The natural right of reproductive freedom suggested here is in keeping with the historical and moral values of both the Western and Eastern heritages, and is in accord with the natural law, right reason, and a fundamental respect for individual

human dignity. Such a timeless principle would certainly have received the unanimous consent of America's Founding Fathers.

Sixty years of judicial activism in the area of reproductive control must be reversed swiftly and completely. *Amicus* urges the Court to recognize the right of States to completely regulate reproductive technologies for broadly defined reasons of health, including physical, psychological, moral, and social health. At the same, *Amicus* urges the Court to restore immutable protection in the law for every individual's natural right to reproductive freedom.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF *AMICUS*

The Elliot Institute for Social Sciences Research is an independent, not-for-profit research group committed to a program of original research in the areas of abortion, birth control, and population control.

The research associates of the Elliot Institute are leaders in the investigation and documentation of the psychological aftereffects of abortion on women. The Elliot Institute has collected over 1500 case studies of women who have suffered psychological aftereffects of abortion. It has also published major reviews of the literature in this field, and has published the results of two major surveys of post-abortion women.

Present research projects include a controlled, longterm study of the aftereffects of abortion using a random population of women. This is the largest such study ever done, with over 800 randomly selected participants. In addition, the Elliot Institute is undertaking a case study of approximately 80 women who suffered post-abortion trauma after aborting children conceived by sexual assault and a comparable sample of women who carried sexual assault pregnancies to term.

Elliot Institute research establishing a statistical link between inadequate pre-abortion counseling and increased severity of post-abortion reactions has been accepted for publication in a leading peer review journal of family and adolescent psychology.